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No. 84-944

IN THE

Supreme Court of the United States

October Term, 1984

LOUIS HEIMBACH, as County Executive of Orange County on behalf of himself and all those similarly situated in the Metropolitan Transportation District of the State of New York,

Petitioner,

against

RODERICK CHU, as Commissioner of the New York State Department of Taxation and Finance, and WARREN ANDERSON, as Temporary President of the New York State Senate,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Did the Court of Appeals for the Second Circuit hold correctly that petitioner's claims were barred as *res judicata* under New York law, and that the preclusive effect of a prior state court judgment was entitled to full faith and credit under *Migra* v. *Warren City School District Board of Education*, —— U.S. ——, 104 S. Ct. 892 (1984)?

2. Did the Court of Appeals also hold correctly that the Tax Injunction Act, 28 U.S.C. § 1341, bars any federal action to enjoin the collection of a state tax, regardless of whether the action challenges the method of enactment of a state tax statute or its substantive provisions?

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Statement of the Case

As set out more fully in the decision of the Second Circuit, this case involves a challenge to the so-called "fast roll call" voting procedure used in the New York State Senate (Petition Appendix pp. 21a-24a, "Pet. App."). After challenging a sales and use tax enacted under this procedure in the state courts, with respect to which this Court dismissed an appeal for want of a substantial question, *Heimbach* v. *State,* —— U.S. ——, 104 S. Ct. 386 (1983), petitioner then sought a district court judgment de-

claring that the State Senate's voting procedure violated the Guaranty Clause of the United States Constitution and that a tax provision, N.Y. Tax Law § 1109 ("Section 1109"), enacted by this voting procedure, was invalid because the manner in which it was passed violated the equal protection and due process clauses of the United States Constitution. The court below affirmed dismissal of the complaint (Pet. App. pp. 23a-24a).

Respondents rely on the facts as set forth in the decision of the Second Circuit (Pet. App. pp. 21a-24a). We note, in addition, that the method by which State Senator Howard Nolan allegedly attempted to have himself marked absent from the Senate Chamber, and therefore not counted as voting on any fast roll call or traditional roll call vote, was an informal procedure for noting an absence (A. 126*). The formal method, as prescribed by Senate Rule IX, § 1(a),** was for the Senator to rise and request that the clerk mark him absent upon the assent of a majority of the Senate, before the Senator left the Chamber (A. 126). It is undisputed that Senator Nolan failed to follow this formal procedure (A. 42-43, A. 126). His telephone call to the Senate Minority Leader, in which he allegedly requested that his absence from the Chamber be noted, was an informal request not guaranteed to result in an excused absence (A. 126).

The prior state court proceedings are described in the Second Circuit's decision (Pet. App. p. 23a), in the District Court's decision (Pet. App. pp. 5a-7a) and in the Petition

* References preceded by "A" are to the appendix filed in the New York Court of Appeals. The appendix was filed with the District Court and was certified as part of the record in the Second Circuit. Respondents will provide the appendix if petitioner disputes any of the established facts in his reply brief.

** Pertinent portions of the Senate Rules are reproduced in the appendix to this brief, and in the appendix to the Petition.

at pages 5-7. Respondent emphasizes that the three claims alleged in the federal court complaint, for the dismissal of which petitioner seeks this Court's review, were never raised or decided in the prior state court proceedings, although they could have been raised and decided there (Second Circuit decision, Pet. App. p. 25a).

Indeed, petitioner conceded in the Appellate Division that the fast roll call, used to record Senator Nolan as voting in favor of the challenged tax measure, Section 1109, notwithstanding his absence from the Chamber, did not violate the United States Constitution. *Heimbach* v. *State*, 89 A.D.2d. 138, 148 (2d Dept. 1982) (*per curiam*).

In the state's highest court, petitioner also did not argue that the use of the fast roll call procedure violated the United States Constitution (Second Circuit decision, Pet. App. p. 25a, District Court decision, Pet. App. pp. 12a-13a, Verified Complaint filed in the Supreme Court of the State of New York, Orange County, A. 9-23). He limited his challenge to arguments based on the New York State Constitution, Art. III, § 14, Senate Rules VIII, § 6, IX, §§ 1(a), 2(a), 7, and Legislative Law § 40.

ARGUMENT

I.

The Petition Presents No Special or Important Reason for Granting the Writ.

Petitioner's three claims could have been raised and determined in a prior state court action, but were not. Hence, as held below, they are now barred by the doctrine of *res judicata* (*infra*, p. 5). The claims are also barred

by the Tax Injunction Act (*infra*, p. 7), or, to the extent not barred, are not justiciable or presented by a petitioner with requisite standing (Second Circuit decision, Pet. App. p. 28a).

Even if petitioner's claims are not barred, this Court has consistently held that the Guaranty Clause of the United States Constitution, Art. IV, Sec. 4, is enforceable only by Congress. *Highland Farm Dairy* v. *Agnew*, 300 U.S. 608, 612 (1937); *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U.S. 118, 151 (1912); *Luther* v. *Borden*, 48 U.S. 142 (1849). Nor is the Clause offended by the rule of convenience that permits a New York State Senator to be recorded as voting in favor of a measure despite his absence from the Senate Chamber. A Senator who must leave the Senate Chamber before casting his vote may signal his affirmance of all measures taken up by fast roll call by leaving the Chamber without having himself marked absent (A. 123-25). Conversely, a Senator who does not wish to be recorded as favoring a measure may rise and ask that the clerk note his absence before the Senator leaves the Chamber. (*Id.*) Thus, Senator Nolan had only to follow Senate Rule IX, § 1(a) to avert the error alleged by petitioner—an unintended aye vote recorded in favor of Section 1109 by the clerk for an absent Senator.

Finally, the corruption envisioned by petitioner at p. 7 of the Petition, in which the five Senators whose names are called on a fast roll call conspire to enact legislation in a deserted Senate Chamber, cannot occur. A quorum is required to enact any legislation, and any of the five Senators whose names are called on a fast roll call, including the

Minority Leader, may expose the non-existence of a quorum under Senate Rule IX, § 2(f), or that lack of a quorum may be noted by the clerk *sua sponte* under Senate Rule IX, § 2(d).

II.

The Second Circuit Correctly Held that the Action Was Barred by *Res Judicata*.

This Court's decision in *Migra* v. *Warren City School District Board of Education*, —— U.S. ——, 104 S. Ct. 892 (1984), was announced after the District Court dismissed the complaint on statutory grounds (*infra*, p. 7). The defense based on the doctrine of *res judicata* was raised in the District Court and preserved for consideration by the Second Circuit (Pet. App. p. 24a), which affirmed the dismissal on the basis of *Migra* v. *Warren City*, as well as the grounds relied on by the District Court.

The Second Circuit correctly found that the constitutional claims raised in the complaint would have been heard and decided by the state's highest court had those claims been raised. The New York Court of Appeals has unequivocally demonstrated its willingness to address challenges to legislative procedures on constitutional grounds. *See Board of Education* v. *City of New York*, 41 N.Y.2d 535, 538 (1977); *Anderson* v. *Krupsak*, 40 N.Y.2d 397, 402-04 (1976); *N.Y. Public Interest Research Group* v. *Steingut*, 40 N.Y.2d 250 (1976); *Schneider* v. *Rockefeller*, 31 N.Y.2d 420, 434 (1972); *see also, Norwick* v. *Rockefeller*, 70 Misc. 2d 923, *aff'd*, 40 A.D.2d 956 (1st Dept. 1972).

Petitioner's federal constitutional claims were not before the New York Court of Appeals when it ruled that it would not entertain petitioner's challenge to Section 1109 because the statute had been certified as having been passed by the correct number of votes under N.Y. Legislative Law § 40.* The Second Circuit correctly pointed out that "section 40 is conclusive evidence only as to matters certified by the presiding officer. He certifies that the bill 'so passed.' He does not certify that the method of passage met the requirements of the United States Constitution. *See Franklin National Bank* v. *Clark*, 26 Misc. 2d 724, 745 (1961)" (Pet. App. p. 26a). Thus, the lower court correctly held that petitioner's federal constitutional claims would have been heard in the state courts had those claims been presented there.

The decision of the New York Court of Appeals was entitled to the same *res judicata* effect in the District Court as it would have had in the state courts. Since the state courts would have precluded claims that were or could have been raised in the prior proceeding, under a transactional identity approach to *res judicata*, *Reilly* v. *Reid*, 45 NY2d 24, 27-31 (1978); Restatement of Judgments 2d, § 25d (comment e, p. 213), the Second Circuit correctly concluded in keeping with *Migra* v. *Warren City* that dismissal was warranted.

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* Petitioner's federal claims were not raised in the prior state court action. *See* discussion of state court action, *supra*, p. 2-3. The federal equal protection challenge to the substantive provisions of Tax Law § 1109, as opposed to the method of its enactment, was separately considered by the State's highest court and rejected (Pet. App. p. 32a). This Court dismissed petitioner's appeal for want of a substantial federal question. ——U.S. ——, 104 S. Ct. 386 (1983).

III.

The Second Circuit Correctly Held that the Action Was Barred by the Tax Injunction Act.

Although it was not necessary for the Second Circuit to consider an alternative ground for dismissal, it did so in affirming the lower court's finding that two of petitioner's three claims were barred by the Tax Injunction Act, 28 U.S.C. § 1341 (Pet. App. pp. 27a-28a).

Petitioner contended that his claims were not barred by the Act because he challenged the method by which Section 1109 was enacted, not its substantive provisions. The Second Circuit held that the Act bars any action to enjoin collection of a state tax, whether the grounds for invalidation are procedural or substantive. This conclusion was based on sweeping language in recent decisions of this Court "drastically" limiting federal court jurisdiction to enjoin the collection of state taxes. *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503, 522 (1981); *California* v. *Grace Brethren Church*, 457 U.S. 393, 411-13 (1982).

The petition presents no reason why the limitation of the Tax Injunction Act should not apply. Even if an exception to the Act were recognized for procedural as opposed to substantive challenges to state tax statutes, petitioner would not be entitled to claim that exception. Petitioner's objective since first commencing his various challenges to Section 1109 has been to stop the state from collecting taxes. Petitioner's first action in federal court challenged the substantive provisions of Section 1109 on

federal equal protection grounds, and contained no allegations about its method of enactment (District Court decision, Pet. App. p. 5a). That action was discontinued. Petitioner's state court challenge repeated the substantive challenge on federal equal protection grounds and added claims based on the manner in which the section was enacted, under state constitutional and statutory provisions (Second Circuit decision, Pet. App. p. 23a, District Court decision, Pet. App. pp. 6a-7a, Verified Complaint filed in the Supreme Court of the State of New York, Orange County, A. 9-23). The state court action was dismissed on all grounds (New York Court of Appeals decision, Pet. App. p. 31a).

After this Court dismissed petitioner's appeal from that portion of the decision of the Court of Appeals dismissing his equal protection challenge (104 S. Ct. 386), petitioner filed the complaint that forms the basis of this petition, framing his challenge in procedural terms only. Given the nature of petitioner's past challenges to Section 1109, it is disingenuous for him to claim that his principal objective is not the invalidation of a state tax, but rather the method by which the tax was enacted. Thus, even if the Tax Injunction Act did not bar the District Court from hearing a challenge to the method of enactment of a state tax statute, petitioner could not qualify for such an exception.

IV.

The Claimed Conflict Between the Second and Third Circuits Provides No Basis for Further Review.

The issue that petitioner alleges the Second and Third Circuits are in conflict was not necessary to the decision below. As we have shown, this action was properly dismissed in accordance with *Migra* v. *Warren City School District Board of Education.* There was thus no need for the Second Circuit to address the grounds for dismissal originally relied upon by the District Court, namely, the applicability of the Tax Injunction Act, 28 U.S.C. § 1341 (*supra,* p. 7).

Even if this issue were preserved for review, there is no disagreement between the Second and Third Circuits sufficient to merit review. Petitioner relies on *Parker* v. *Merlino,* 646 F.2d 848, 852-53, n. 11 (3d Cir. 1981), which affirmed a decision refusing to apply the Tax Injunction Act to a complaint that challenged the method of enactment of a state tax statute. The Third Circuit specifically noted its uncertainty about "whether the Act applies to actions for declaratory relief in a case such as this." *Id.* This Court's later decision in *California* v. *Grace Brethren Church,* 457 U.S. at 411, made clear that the Act applied to constitutional challenges seeking declaratory relief. The soundness of the Third Circuit's reasoning in *Parker* v. *Merlino,* is, after *California* v. *Grace Brethren Church,* doubtful. As the Third Circuit would most likely decline to follow its own reasoning in *Parker* v. *Merlino,* the fact that the Second Circuit has also declined to follow its rea-

soning would not create conflict between the Circuits sufficient to grant certiorari even if the issue to which the alleged conflict related had been a necessary part of the decision below.

Conclusion

The Petition for a Writ of Certiorari Should Be Denied.

Dated: New York, New York
February 28, 1985

Respectfully submitted,

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APPENDIX

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New York State Senate Rules of Procedure

Rule IX, § 2. Quorum. a. A majority of all the Senators elected shall constitute a quorum to do business. In case a less number than a quorum of the Senate shall convene, those present are authorized to send the Sergeant at Arms, or any other person, for the absent Senators.

Rule IX, § 2(d). If, on taking the final question on a bill, it shall appear that a constitutional quorum is not present, or if the bill requires a vote of two-thirds of all the Senators elected to pass it, and it appears that such number is not present, the bill shall retain its place on the Calendar and be again taken up in its regular order.

Rule IX, § 2(f). If at any time during the session of the Senate a question shall be raised by any Senator as to the presence of a quorum, the Presiding Officer shall forthwith direct the Secretary to call the roll, and shall announce the result, and such proceeding shall be without debate; but no Senator while speaking shall be interrupted by any other Senator raising the question of a lack of quorum, and the question as to the presence of a quorum shall not be raised oftener than once in every hour unless the lack of quorum shall be disclosed upon a roll call of the ayes and nays.

Rule IX, § 7. Absences. In all cases of absence of Senators during the sessions of the Senate, the Senators present may take such measures as they deem necessary to secure the presence of the absentees, and in addition to suspension for a given period, may inflict such censure or penalty as they may deem just on those who shall not render sufficient excuse for their absence.